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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1977

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No. 77-208

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AMALGAMATED TRANSIT UNION, LOCAL 788,  
Petitioner,

v.

BEN ALLEN, et al.,  
Respondents.

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Eighth Circuit**

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**INTRODUCTION**

Petitioner files this Supplemental Brief, pursuant to Rule 24, to call attention to a new decision unavailable to Petitioner at the time it filed its Petition for a Writ of Certiorari on August 6, 1977. On July 15, 1977, the United States Court of Appeals for the Eighth Circuit issued its opinion in *DeGraffenreid v. General Motors Assembly Division, St. Louis*, — F.2d —, 14 EPD ¶ 7692 (No. 76-1599, 8th Cir. 1977). This opinion directly supports Petitioner's position before this Court. Peti-

tioner therefore respectfully requests that the Court consider *DeGraffenreid, supra*, as additional authority in support of Petitioner's argument and reasons relied on for allowing this Writ.

As previously noted, the Eighth Circuit Court of Appeals decided the case at bar before the decision of this Court in *United Air Lines, Inc. v. Evans*, No. 76-333, 45 U.S.L.W. 4566, announced on May 31, 1977. By that date, Petitioner could not file a timely motion for rehearing before the Court of Appeals. Instead, Petitioner filed Suggestions to Reconsider based on *Evans, supra*. These Suggestions were denied without explanation by the Court of Appeals (See Appendix II of Petition for a Writ of Certiorari). Since the Court of Appeals, without explanation, denied Petitioner's request to reconsider its opinion, it is reasonable to assume that such action was based merely upon the expiration of time for filing a motion for rehearing. This interpretation is particularly warranted in view of the holding in *DeGraffenreid*, which clearly comports with this Court's decision in *Evans*, and is manifestly inconsistent with the decision of the Court of Appeals in the instant case. The application of the Eighth Circuit's reasoning in *DeGraffenreid* to this case provides additional authority for Petitioner's position that the decision below should be vacated and summarily reversed.

### SUPPLEMENTAL ARGUMENT

The Court of Appeals in *DeGraffenreid* applied the holding by this Court in *Evans*, in a manner totally consistent with Petitioner's previous arguments before this Court. The decision below in the instant case, based upon the now rejected reasoning in *Evans v. United Air Lines, Inc.*, 534 F.2d 1247 (7th Cir. 1976), which was reversed by this Court, cannot stand.

In *DeGraffenreid*, several black females sought relief under Title 42, U.S.C. Section 1981 and Title 42 U.S.C. Section 2000e et seq. by way of retroactive seniority benefits. Specifically, plaintiffs alleged that defendant's discriminatory hiring practices in 1965, 1966 and 1967 precluded plaintiffs from gaining seniority credit to which they were purportedly due. Subsequently, all plaintiffs were hired by defendant and then laid off. In analyzing these facts, the Eighth Circuit correctly applied this Court's reasoning in *Evans*, as illustrated by the following language in *DeGraffenreid*:

The appellants, however, failed to file any complaint with the EEOC until August 28, 1974, at least seven years after the alleged initial discriminatory hiring practices, at least one year after General Motors hired the last of the appellants, thus ending any discrimination in hiring against them, and more than six months after the mid-January 1974 layoffs. Clearly, under *Evans*, appellants' Title VII claims are barred for failure to file charges within the pre-1972 ninety-day limitations period or within the current one hundred eighty-day limitations period beginning on the last day that GM discriminated against appellants in hiring.

In the present case Petitioner has repeatedly argued that unlawful action, if any, occurred in 1965 or 1966 when Respondents became members of the Petitioner Union. At that point in time, Respondents knew for a certainty that they would not be



granted seniority credit by the Union based upon their prior service with their previous employer. Therefore, Respondents' Title VII charges filed five (5) years thereafter, and their Section 1981 suit filed at least eight (8) years later, were untimely. The Court in *DeGraffenreid*, squarely confronted this issue by stating:

Thus, when appellants failed to file charges with the EEOC within one hundred and eighty days following their *entry into service*, GM was entitled to consider its earlier failure to hire appellants as lawful, a mere "unfortunate event in history which has no present legal consequences." *United Air Lines, Inc. v. Evans* . . . and measure appellants' seniority from their actual dates of hire. (Emphasis supplied)

Petitioner asserts that it is clear from the foregoing language that the Eighth Circuit Court of Appeals has applied this Court's decision in *Evans* in a manner which would have barred Respondents' claims in the present case had it been decided after *Evans*. In effect, the Court of Appeals has now applied *Evans* in the precise manner asserted by Petitioner in its Petition to this Court. Therefore, the decision in this case, rendered before the *Evans* opinion, is squarely inconsistent with this Court's holding in *Evans*. That holding is equally as controlling here, as it was in *DeGraffenreid*, as illustrated by the following language quoted from *Evans*, by the Court of Appeals:

Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.* (Emphasis supplied)

Therefore, Petitioner respectfully submits that this Writ should be granted to assure consistent application of this Court's ruling in *Evans*, and to resolve the inconsistency within the Eighth Circuit Court of Appeals between this instant earlier case and the subsequent decision in *DeGraffenreid*.

### CONCLUSION

For the additional reasons stated above, this Petition for Writ of Certiorari should be granted, and the decision of the Court of Appeals vacated and summarily reversed.

Respectfully submitted,

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